OPENING STATEMENT

of

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INTRODUCTION

Mr. Chairman, distinguished members of the Senate Committee on Commerce, Science and Transportation, good morning.

Thank you for inviting my colleagues and I here today for this important oversight hearing. I am pleased to offer my views on the Commission's efforts to fulfill the specific statutory responsibilities delegated to it by Congress, which I believe should be our first and highest priorities. I will focus my remarks on our progress with respect to a few of the most important mandates of the 1996 Telecommunications Act. They are:

* Section 254's Universal Service Provisions
* Section 271 Applications for RBOC entry into Long Distance
* Section 706 and Advanced Services
* Section 10's Regulatory Forbearance Mandate

I will also briefly address the Commission's merger review efforts, its continued delay in re-examining the broadcast ownership rules and the question of restructuring the agency.

UNIVERSAL SERVICE

Perhaps, the most celebrated aspect of the monopoly phone system that existed before the 1996 Act was the degree to which it fostered ubiquitous and affordable phone service. In moving away from state-sanctioned monopoly to a competitive model, Congress was careful to ensure that "universal service" be "preserved and advanced." In other words (chosen by Congress), Commission policies should promote access to telecommunications and information services that are "reasonably comparable" to those available in urban areas at "reasonably comparable" rates.

Yet, Congress also well understood that if the benefits of competition were to be realized, the subsidy mechanisms of universal service would have to change. Closed monopolies could no longer be allowed to subsidize high cost or residential customers implicitly through higher rates on low volume and business customers. The reason was simple: new competitors would not enter high cost markets where the incumbent alone could subsidize its rates and would instead enter business and low cost markets, where the margins were much higher. Such a condition would deny residential rural and high cost customers the promised rewards of competition. To address this distortion, Congress commanded that universal service mechanisms be "specific," "predictable" and "explicit." By having the subsidy known and portable, competing carriers would have an incentive to compete for high cost customers, too, because they could win the subsidy along with the customer.

In addition to the exercise of making implicit subsidies explicit, Congress required a number of other measures that would necessarily add costs to serving customers. Some were mechanisms designed to facilitate competition and its hoped-for benefits, such as local number portability, and levying the universal service contribution on a broader class of customers, such as wireless carriers. The Schools and Libraries program, though its purpose is worthy, required substantial increases in money to fund the program, with no direct benefit to competition.

Congress tasked the Commission, thus, to develop a universal service system that was "explicit" and that would produce a "sufficient" amount of money to "preserve and advance" "reasonably comparable" rates and access to both rural and urban customers. Congress understood the importance of doing this quickly, for it set relatively tight implementation requirements on the agency.

Regrettably, I must report that the core of Congress' mandate in this regard has not yet been achieved. While most would agree that the remnants of the implicit system continue to provide "reasonably comparable" rates to our citizens, the competitive distortions of the implicit system remain, leaving little doubt why CLECs have chosen to enter high volume, low cost business markets (where the rates are inflated relative to costs) rather than residential markets.

I am disturbed by this failing. It would be unfair to suggest that the Commission has not spent time on universal service - the hours are endless. However, I believe we have continued to set aside or bump the difficult and complex issues that would rationalize universal service in a manner that might actually facilitate competition and its benefits to rural and high cost customers, such as access reform and pricing flexibility. Yet, at the same time, we have given high priority to other programs, such as schools, libraries, and rural health care, that require substantial new funds. We dole out these funds much as Congress might distribute the benefits of a new federal program. Talk about access charge reform and cost reductions and rationalization is too often thrown out, not as part of a sound economic public policy exercise, but as a political offset to controversial spending programs.

There is a grave danger here. Competitive pressures that were unleashed by the Act and the Commission continue to put pressures on high cost subscribers and rates. Competitors, despite their protestations to the contrary, continue to pursue business and low cost customers to the exclusion of other customers. And, the government continues to increase rate pressures through actions that demand

more and more money from the system. (Proposed increases in the schools and libraries program and some proposals for high cost assistance to intrastate common line costs require literally billions of dollars of new money.)

The result is that competition languishes, and the distorted, as yet un-reformed universal service system is partially to blame. If this situation is not turned around, I fear that rates may stay low, but the levy of subsidy fees on customers could sky rocket and the benefits of competition could be lost. It will not be long before policymakers openly suggest greater rate regulation to keep these pressures (that they helped create) in check. This would be a profound failure to meet the goals of the Act.

SECTION 271 APPLICATIONS

Another central provision of the Act, is section 271, which was designed as the vehicle by which a BOC would win authorization to enter interLATA markets, while opening their local market to competition. No one seems particularly satisfied with the progress on this front, except perhaps those competitors that benefit from BOCs being barred from lucrative long distance and interLATA data markets.

I continue to appreciate the complaints of the BOCs about the heavy burdens imposed by our interpretation of the checklist, as well as the failure of our procedures to provide timely and complete guidance on how to satisfy these burdens. Some of these complaints have merit, but some of them are merely strategic. I cannot, for example, give too much credence to a BOC that complains mightily about our 271 approach, yet has never filed a section 271 application with the Commission.

This Commission has only one viable vehicle for concretely and definitely addressing section 271 policy questions and that is in the context of a duly-filed application. Congress determined that such a proceeding would be adjudicatory in nature and that we would have only 90 days in which to issue a decision. The only way we really have to address the concerns raised by some companies is to get a viable application before us. Yet, we have not received a 271 application of any sort since July 1998. In fact, the noise level might lead one to believe we have rejected 20 or 30 applications, not just five. The only way for the Commission to successfully implement Congress' will is if the process is given a chance.

That said, I believe that much progress has been made in terms of developing and providing general guidance on section 271 issues. As I, and others, urged, the Commission adopted a collaborative process that permitted continued dialogue with companies to gain a better understanding of what was expected. Some companies have faithfully participated in that process, and though not completely satisfied, have added immeasurably to the effort. Perhaps, more importantly, state commissions have adopted collaborative processes in their states. Working extensively in this manner with the companies has been extremely productive. Indeed, their good efforts will likely lead to a number of strong presentations to the FCC later this year. In that context, the FCC will have another meaningful opportunity to advance the Congress' section 271 objectives of promoting competition in both the local and long distance telephone markets.

ADVANCED SERVICES

Recognizing the advent of great technological achievement in communications, Congress minted section 706, which charged the Commission with encouraging the deployment of advanced services by removing regulatory barriers to such deployment. Our initial set of proposals to implement Section 706 from the 1996 Act are still pending, though our preliminary reports indicate that broadband deployment while progressing, is lagging behind innovative applications that depend upon it, and consumers' demand for those services. This is, in part, due to the heretofore unseen pace of innovation and change. We have watched a technological eternity go by since Congress passed the Telecom Act in 1996. Convergence, digitalization, the rise of IP-based networks, and strategic mergers have all metamorphosed what we now loosely call "the industry." The potential benefits that lay on the horizon for consumers have grown exponentially from the simple vision of choice in basic telephone service. So, too, have the risks that

we may stay so focused on local residential voice markets, or short-sighted priorities, that we fail to unleash the power of competition for advanced services, as section 706 contemplates.

I believe that the FCC and Congress must work diligently, if not urgently, to understand the developments in this area. All competitors in this fiercely contested market will attempt to bend the regulatory and governmental process to their own commercial will. But our duty is to the public. Our first instinct, therefore, must be to stay committed to markets and competition, rather than regulation, as the vehicle for disciplining anticompetitive behavior, as the engine for driving innovation, and as the tool for maximizing consumer welfare. It is the only system ever devised that has proven up to the task of giving consumers what they want, allowing private firms to prosper and spurring innovation, especially at a time of rampant change. Our historical commitment to this system has fostered a nation where entrepreneurship and private enterprise thrives.

Regulation from our "Commanding Heights" has its time and place, but it must be the exception in this incredibly fast-paced, technology-driven environment. The regulators' rush to lend a helping hand at the first sign of anxiety has proven, so often, to be more disruptive and counter-productive than the converse. I am of the view that anyone advocating the extension or intrusion of regulation into such a vibrant market bears a heavy burden of proving that the public, as opposed to firms with a particular business plan, will likely be harmed, absent doing so. Proffered arguments should be eyed skeptically and critically. Speculation of future anticompetitive behavior should be viewed with suspicion, especially in nascent markets where supposed would-be monopolists in fact lack market power. We must have enough courage to test and cross-examine rhetorical appeals. "Digital divide," "light touch," etc., are great sound bites, but are they truly meritorious arguments, or just clever window dressing for n ew regulation or purely short-term political or economic self-interests?

Before regulating in new areas such as advanced services (including the pursuit of social objectives), we should first attempt to unshackle the full flurry of all potential competitors. I do believe, for example, that potentially important gladiators in the broadband battle are the LECs, who have yet to fully join the data-driven fight due to government regulations targeted at a different set of issues. But, they are not the only ones. Electric utilities hold a lot of promise. Wireless carriers do not intend to sit out this battle. Satellite providers are charging headlong into the fray. One need only read the daily headlines reporting the latest strategic partnerships. A positive, un-regulatory, national policy for advanced services (as embodied in Section 706 and other statutory provisions, if implemented correctly) will push to get these forces into the battle and save us the consequence of a futile regulatory, industrial policy.

REGULATORY FORBEARANCE

Speaking of un-regulating, an important tool that I believe has been under-utilized so far is the FCC's forbearance authority under Section 10 of the Communications Act. I have criticized some of our recent decisions in which the Commission declined to forbear from our rules or certain statutory provisions. The merits of those forbearance petitions have been less my concern, for reasonable minds can differ. My dissatisfaction has been generally with the standard we apply and our analysis, which seems to place the entire burden of forbearance on the moving party. I believe Congress expected the Commission to accept more responsibility for demonstrating a continued need for regulation in the presence of a healthy, competitive market or where forbearance would promote competition.

Indeed, I believe the Commission ought to employ a burden-shifting device in forbearance cases. In operation, once a petitioner demonstrates that the market in which it operates is competitive (i.e., no competitive firm or entity enjoys market power, price trends are checked or downward, innovation is occurring) the burden would shift to the FCC and the opponents of forbearance to demonstrate why regulation is still necessary. And, in making that judgment, the Commission should not be able to simply rest on the grounds that the rule served a public purpose and petitioners have failed to prove that purpose is no longer worthy. The question should be whether the rule at issue is in fact superior to competition for serving that purpose.

We should undertake a substantive and factual examination of the rule and its effects to determine if its purpose truly must be achieved through regulation instead of market forces. This approach presumes that healthy competition will normally maximize consumer welfare better than any regulation would, a presumption that we all must embrace to even get out of the starting block. Where competition has not quite "arrived" to a market, we need to develop a greater faith that the deregulation embodied in Section 10 can serve to promote competition in most instances. We need to carefully analyze and understand what other mechanisms (competition, other types of less burdensome regulation, other regulatory bodies such as the States) make a certain regulation unnecessary so that we can chip away the layer upon layer of regulatory requirements as we transition to a competitive marketplace.

MERGERS

The debate over the value of FCC merger review in addition to review by one of the antitrust agencies is well-worn. Clearly, as the keepers of the Communications Act and its policies, the FCC has some unique expertise that it can bring to telecommunications merger review that probably advances the public interest. Our review, however, is not generally limited to those areas in which we can claim primary expertise. Very often, we undertake a classic antitrust analysis, applying the same principles, precedents and guidelines as those employed by the antitrust authorities and rarely, if ever, does it produce different results.

Such reviews can be quite burdensome on the parties and time consuming. For example, the FCC often requires voluminous filings that are duplicative of those made to the Department of Justice or the Federal Trade Commission. They often must incur the expense of outside counsel to prove their case to both agencies. I have come to doubt whether the marginal value of full-blown merger review by the Commission is justified by its cost in time and resources. Moreover, with all due respect to our hard working staff, we do not really possess enough personnel schooled in antitrust and competitive economics to do the job well consistently. The antitrust authorities do. I believe that there is room to preserve a more limited, complementary role for the FCC in the review of mergers, while limiting its involvement to its areas of expertise.

If the Commission engaged in a simultaneous review with the antitrust authorities, this could improve efficiency. Under such a scheme, the parties would be required to file most documents only once and to one agency. The Commission would weigh in on issues such as whether the merger would violate an express provision of the Communications Act, or would otherwise undermine the congressional scheme. Furthermore, the FCC would consider the merger's impact on other communications policies such as media diversity and universal service that are not appropriately considered by antitrust authorities. But the Commission would defer to the antitrust authority's competitive analysis.

BROADCAST OWNERSHIP

Section 202 of the 1996 Telecom Act directed the FCC to make a number of specific changes to its broadcast ownership rules. Where the Act gave specific direction, the Commission has changed its rules as directed. Section 202 also more generally directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its imitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market." This is the so-called "TV-Duopoly" rule.

While technically the Commission is in compliance with the statute, since it initiated a rulemaking in November 1996, there is reason to be concerned about its slow progress. The Commission has a backlog of cases that it has been unable to resolve, pending the rulemaking's completion. The lack of closure is impeding business operations and complicating business planning.

Another provision of Section 202, the biennial review provision, directs the Commission to "review its rules adopted pursuant to the section and all of its ownership rules biennially as part of its regulatory reform under section 11 [of the Communications Act]." The Commission issued a Notice of Inquiry in March 1998, yet nothing further has been done on this matter.

I share the concern that the Commission has not fully examined its broadcast ownership rules as directed in the 1996 Telecom Act. Congress realized that many of the assumptions underlying these rules were formed decades ago, when the media landscape was quite different. For my part, I have serious doubt that these rules can be defended on the basis of the justifications given when they were adopted. These rules rest on antiquated moorings devised at a time when the broadcast industry looked very different than it does today. They deserve rigorous examination. Such examination should take into account the full competitive environment in which broadcasting operates - we should look at the impact of competition from cable, satellite and Internet services, for example.

The Commission does need to assess the dynamic changes in technology and media markets to determine what limited rules are necessary to promote our public objectives, and sections 11 and 202 afford us the opportunity.

Part of the difficulty of reaching consensus on new ownership rules, is that they are infected with myriad goals and objectives that may not always be reconcilable. The competitive benefits of looser rules, may undermine (to some) our diversity goals. Indeed, I believe that continued anxiety about the effects of greater liberalization of ownership rules on diversity of ownership, voices and programming is the single greatest impediment to reaching a consensus on these structural rules.

The Commission has struggled to develop a clear consensus on acceptable diversity principles that not only promote the public good, but that can withstand strict judicial scrutiny. This struggle, as much as anything, has contributed to the lack of progress on these rules.

For this reason, I urge this Committee to take up the ownership diversity question and contribute to developing a sustainable consensus, so that we might move forward on ownership rules. I applaud Chairman McCain's stated commitment to exploring ownership diversity and his willingness to lead a legislative effort that promotes our cherished national commitment to meaningful opportunity in our most robust and critical industry. I stand ready to assist the Committee and Congress in formulating a sound, principle-based diversity initiative that will allow us to move forward.

FCC REAUTHORIZATION

With all of the crucial substantive tasks on our plate, we must still be able to step back and take a look at this agency and assess its structure and operation so that we can do the highest quality job that this Congress commands. I support Chairman Kennard's effort to develop a strategic plan for restructuring and streamlining FCC functions and management. I am hopeful that we will be able to move forward quickly under this plan to make needed changes. In my testimony at a House reauthorization hearing in March (which is attached), I offered some specific suggestions for consideration during the FCC reauthorization process.

Specifically, I believe that before beginning any exercise to fix or restructure the Agency, I think it prudent to first consider what we think is broken or is not working particularly well at the FCC. I would submit five areas for exploration: (1) the need to more clearly define the Commission's annual priorities and focus; (2) the need to operate efficiently enough to meet the demands of an innovation driven market; (3) how to structure the Agency to better align with market trends and demands; (4) whether to continue the administration of functions that are largely duplicated elsewhere in government; and (5) the breadth of the Commission's quasi-legislative authority. I explore these issues more fully in my attached testimony before the House Subcommittee.

CONCLUSION

Let me close by saying that I look forward to continuing to work with members of this Committee, other members of Congress, and with my colleagues on the many challenges that await us in implementing our statutory mandates. Thank you for your attention and I look forward to your questions. ??